



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 15, 1993

Mr. William J. Delmore, III
Harris County District Attorney's Office
201 Fannin, Suite 200
Houston, Texas 77002-1901

OR93-316

Dear Mr. Delmore:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19457.

The Harris County District Attorney's Office (the "district attorney") has received a request for seven specified case files. Specifically, the requestor seeks case files for cause numbers 576,019; 595,462; 132,261; 132,262; 117,242; 289,794; and 411,212. You advise us that the case file for cause number 117,242 has been destroyed. The Open Records Act does not require a governmental body to disclose information that does not exist. Open Records Decision Nos. 558 (1990); 362 (1983). While you do not object to disclosure of the pleadings and instruments filed in the various district courts, you claim that the remaining information is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), and 3(a)(8) of the Open Records Act.

Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You claim that the requested information is excepted by section 3(a)(1) because it constitutes work product and is subject to the "law enforcement privilege" set forth in *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987). We rejected this argument in Open Records Letter No. 93-213 (1993). As we stated in that ruling, section 3(a)(1) does not encompass work product or discovery privileges. Open Records Decision No. 575 (1990). Such protection may exist under section 3(a)(3), if the situation meets the section 3(a)(3) requirements.¹

¹Please note that section 14(f) of the act, added by the 71st Legislature in 1989, chapter 1248, section 18 provides in part that "exceptions from disclosure under this Act do not create new privileges from discovery." Accordingly, the *Hobson* court's apparent use of section 3(a)(8) as a basis for the "law enforcement privilege" is no longer valid.

Section 3(a)(3) excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to that litigation. Open Records Decision No. 551 (1990). Section 3(e) provides that for purposes of section 3(a)(3), "the state . . . is considered to be a party to litigation of a criminal nature until . . . the defendant has exhausted all appellate and postconviction remedies in state and federal court." V.T.C.S. art. 6252-17a, § 3(e); *see also* Open Records Decision Nos. 469 (1987); 433 (1986).


You advise us that cause numbers 576,019 and 595,462 are presently pending in a Harris County district court; that cause numbers 289,794 and 411,212 were resolved with pleas of guilty on March 21, 1979, and March 26, 1985, respectively; that cause number 132,261 was dismissed; and that cause number 132,262 resulted in acquittal after a jury trial on February 4, 1969. With respect to cause numbers 576,019 and 595,462, we conclude that litigation is pending and that the related case files may be withheld from required public disclosure under section 3(a)(3) of the Open Records Act. With respect to the remaining cause numbers, however, you have provided us with no information indicating that the defendants in these cases have not exhausted all of their appellate and postconviction remedies in state and federal court, nor have you provided us with any information demonstrating the pendency or reasonable likelihood of litigation. We therefore have no basis on which to conclude that these cause numbers relate to pending or anticipated litigation. Accordingly, the case files for the remaining cause numbers may not be withheld from required public disclosure under section 3(a)(3) of the Open Records Act.

With respect to section 3(a)(8), you argue that this exception should apply to all material in a closed law enforcement file. You also dispute our use of a standard that permits you to withhold from a closed file only that information the release of which would "unduly interfere with law enforcement." In Open Records Letter No. 93-213, we reviewed the same argument and rejected it. Accordingly, we will apply the existing standard of undue interference with law enforcement. Since you do not claim that any undue interference with law enforcement will be caused by releasing this information, you have waived this argument. Accordingly, the case files for those cause numbers not

excepted under section 3(a)(3) above may not be withheld from required public disclosure under section 3(a)(8) of the Open Records Act and must be released in their entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to ID# 19457.

Yours very truly,


James E. Tourtelott
Assistant Attorney General
Opinion Committee

JET/GCK/jmn

Ref.: ID# 19457
ID# 19573

cc: Mr. David Cunningham
Attorney at Law
2740 Texas Commerce Tower
600 Travis Street
Houston, Texas 77002